A

HAP SENG CONSOLIDATED BHD

v.

DARINSOK PANGIRAN APAN & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED JCA
C [CIVIL APPEALS NO: S-03(IM)-65-04-2012 &
S-03(IM)-67-04-2012]
8 NOVEMBER 2013

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Application for - Whether action could not be sustained and liable to be struck out - Whether there were triable issues warranting trial - Issues raised concerning matters relating to plaintiffs' constitutional and common law rights - Whether issues should be ventilated at trial proper based on evidence adduced - Rules of the High Court 1980, O. 18 r. 19(1)*

D

E

The plaintiffs brought a representative action on behalf of the native communities *ie*, the residents and proprietors of the lands ('said land') vested with native title and customary rights at the Tongod Region seeking declaratory and injunctive reliefs and damages against the defendants. A dispute arose when the
F Director of Department of Lands and Survey, Sabah ('fourth defendant') had approved the first defendant's application for country lease and thereafter had alienated the said land to the first defendant. The plaintiffs' claim against the first, second and third defendants was precipitated by the defendants' wrongful act of
G trespassing onto the said land to conduct survey works and extensive site clearing. The plaintiffs' claim against the fourth and fifth defendants was that the alienation and issuance of a country lease for the said land to the first defendant was wrongful and unconstitutional. In applying to strike out the plaintiffs' writ of
H summons and statement of claim under O. 18 r. 19(1) of the Rules of the High Court 1980, the first, second and third defendants' bone of contention was that the High Court had no original jurisdiction to hear the plaintiffs' claim as the dispute over
I the alienation of the said land was still pending before the Assistant Collector of Land Revenue ('ACLR'). The Deputy Registrar however dismissed their applications. Dissatisfied, the first, second and third defendant appealed to the Judge in

Chambers in encls. 87 and 92 respectively. While the appeals were pending, the Judicial Commissioner ('JC') allowed the defendants' preliminary objection to the plaintiffs' application for injunction and as a result, the plaintiffs' claim was accordingly dismissed. Aggrieved by the aforesaid decision, the plaintiffs appealed to the Court of Appeal, which was dismissed. However, the plaintiffs were successful in obtaining leave to appeal to the Federal Court which subsequently allowed the plaintiffs' appeal and directed the High Court to hear encls. 87 and 92 *ie*, the two appeals by the first, second and third defendants against the decision of the Deputy Registrar in refusing to strike out the plaintiffs' writ and statement of claim. In consequence, the plaintiffs' suit was reinstated and remitted back to the High Court. The High Court judge dismissed encls. 87 and 92 and in so doing, held, *inter alia*, that there were triable issues in the plaintiffs' claim. Hence, these two appeals.

Held (dismissing appeals with costs):
Per Raus Sharif PCA delivering the judgment of the court:

(1) The court will only strike out a writ and statement of claim when it is plainly obvious that the action cannot be sustained and was liable to be struck out pursuant to O. 18 r. 19 of the Rules of the High Court 1980. Herein, this was not a proper and fit case for the plaintiffs' writ and statement of claim to be struck out. The fact that the Federal Court had allowed the plaintiffs' earlier appeal against the decision of the Court of Appeal that the High Court should not have struck out the plaintiffs' claim based on the preliminary objections of the defendant, was a clear indication that there were triable issues before the High Court which warranted a trial. (paras 16 & 17)

(2) The issues raised in this appeal and the relief sought thereof did not relate to jurisdiction of the court but concerned matters relating to the plaintiffs' constitutional rights and common law rights. Whether the plaintiffs succeed or not is a matter to be tried by the trial judge who has to take into consideration the decision of the Court of Appeal as well as the Federal Court. The High Court judge was therefore correct in refusing the defendants' striking out applications premised on his findings that there were triable issues in the

plaintiffs' action. The affirmation by the Federal Court in the earlier appeal had put the correctness and propriety of the High Court judge's decision beyond question. Thus, in the interest of justice, it was only proper that all the issues raised in this appeal should be ventilated at the trial proper based on the evidence adduced by the parties. (para 17)

Bahasa Malaysia *Translation Of Headnote*

Plaintif-plaintif membawa suatu tindakan perwakilan bagi pihak komuniti anak negeri iaitu penduduk dan pemilik tanah ('tanah tersebut') yang diberi hak milik dan hak tanah adat di Tongod Region memohon relif-relif perisytiharan dan injunksi dan ganti rugi terhadap defendan-defendan. Satu pertikaian timbul apabila Pengarah Jabatan Tanah dan Ukur, Sabah ('defendan keempat') telah meluluskan permohonan defendan pertama untuk pajak daerah dan kemudiannya telah mengasingkan tanah tersebut kepada defendan pertama. Tuntutan plaintif-plaintif terhadap defendan pertama, kedua dan ketiga telah dicetuskan oleh tindakan salah defendan-defendan atas pencerobohannya ke atas tanah tersebut untuk menjalankan kerja-kerja kajian dan pembersihan tapak yang luas. Tuntutan plaintif-plaintif terhadap defendan keempat dan kelima adalah bahawa pengasingan dan pengeluaran pajak daerah bagi tanah tersebut kepada defendan pertama adalah salah dan tidak mengikut perlembagaan. Dalam memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif-plaintif di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980, asas penghujahan defendan pertama, kedua dan ketiga adalah bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa asal untuk mendengar tuntutan plaintif-plaintif kerana pertikaian berkenaan pengasingan tanah tersebut masih belum selesai di hadapan Penolong Pemungut Hasil Tanah ('PPHT'). Timbalan Pendaftar bagaimanapun menolak permohonan mereka. Tidak berpuas hati, defendan pertama, kedua dan ketiga merayu kepada Hakim dalam Kamar, masing-masing dalam lamp. 87 dan 92. Sementara menunggu keputusan rayuan, Pesuruhjaya Kehakiman ('PK') membenarkan bantahan awalan defendan terhadap permohonan plaintif untuk injunksi dan akibat daripada itu, permohonan plaintif telah ditolak. Terkilan dengan keputusan tersebut, plaintif merayu kepada Mahkamah Rayuan, yang juga telah ditolak. Walau bagaimanapun, plaintif telah berjaya memperolehi kebenaran untuk merayu ke Mahkamah Persekutuan yang telah membenarkan rayuan plaintif dan mengarahkan Mahkamah Tinggi untuk mendengar lamp. 87 dan 92 iaitu kedua-

dua rayuan oleh defendan pertama, kedua dan ketiga terhadap keputusan Timbalan Pendaftar dalam membatalkan writ saman dan pernyataan tuntutan plaintif. Akibatnya, guaman plaintif telah dihidupkan semula dan dikembalikan kepada Mahkamah Tinggi. Mahkamah Tinggi menolak lamp. 87 dan 92 dan dengan berbuat demikian, memutuskan antara lain bahawa terdapat isu-isu yang perlu dibicarakan. Oleh itu, kedua-dua rayuan ini.

Diputuskan (menolak rayuan-rayuan dengan kos):
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Mahkamah hanya akan membatalkan writ saman dan pernyataan tuntutan apabila jelas bahawa tindakan tersebut tidak boleh dipertahankan dan wajar untuk dibatalkan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Di sini, ia bukanlah kes yang sesuai untuk writ saman dan pernyataan tuntutan plaintif dibatalkan. Fakta bahawa Mahkamah Persekutuan telah membenarkan rayuan plaintif sebelum ini terhadap keputusan Mahkamah Rayuan bahawa Mahkamah Tinggi tidak sepatutnya membatalkan tuntutan plaintif berdasarkan bantahan awalan defendan, adalah satu petunjuk yang jelas bahawa terdapat isu-isu yang perlu dibicarakan di hadapan Mahkamah Tinggi yang mewajarkan perbicaraan.

(2) Isu-isu yang dibangkitkan dalam rayuan ini dan relif yang dituntut tiada kaitan dengan bidang kuasa mahkamah tetapi adalah berkenaan perkara-perkara berhubungan dengan hak perlembagaan dan hak undang-undang biasa plaintif. Sama ada plaintif berjaya atau gagal adalah perkara yang perlu dibicarakan oleh hakim bicara yang harus mengambil dalam pertimbangan keputusan Mahkamah Rayuan dan juga Mahkamah Persekutuan. Oleh itu, Hakim Mahkamah Tinggi adalah betul apabila tidak membenarkan permohonan pembatalan defendan berdasarkan dapatannya bahawa terdapat isu-isu yang perlu dibicarakan dalam tindakan plaintif. Pengesahan oleh Mahkamah Persekutuan dalam rayuan sebelum ini telah meletakkan kebenaran dan kewajaran keputusan Hakim Mahkamah Tinggi dalam keadaan tidak perlu dipersoalkan. Oleh itu, dalam kepentingan keadilan, adalah sesuai supaya segala isu yang dibangkitkan di dalam rayuan harus diputuskan di perbicaraan berdasarkan keterangan yang dikemukakan oleh pihak-pihak yang terlibat.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5, 8, 161A(5)
Land Ordinance (Sabah Cap 68), ss. 9, 12, 13, 14, 15, 16, 41, 69
Rules of the High Court 1980, O. 18 r. 19(1)

(Civil Appeal No: S-03(IM)-65-04-2012)
For the appellant - Simon KY Sim; M/s Shim Pang & Co
For the respondents - Kong Hong Ming; M/s Lee & Kong

(Civil Appeal No: S-03(IM)-67-04-2012)
For the appellants - Michael Denis Tan; M/s Michael Denis Tan & Co
For the respondents - Kong Hong Ming; M/s Lee & Kong

[Editor's note: For the High Court judgment, please see Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2008] 10 CLJ 150.]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] There are two appeals before us filed against the decision of the learned High Court Judge sitting at Kota Kinabalu on 21 March 2012 in dismissing the appellants' notice of appeals to the judge in chambers *vide* encls. 87 and 92 against the decision of the Deputy Registrar. The Deputy Registrar had on 16 March 2003, dismissed the appellants' summons in chambers to strike out the respondents' writ of summons and statement of claim ("striking out application").

[2] Before the High Court, the appellants in the two appeals were the first defendant, second and third defendant whilst the respondents were the plaintiffs. In this judgment, we will refer to the parties as they were in the High Court.

[3] The two appeals filed by the defendants can be briefly stated as thus:

(i) Appeal No: S-03(IM)-65-04-2012 was filed by the first defendant at the court below against the decision of the learned High Court Judge in dismissing the first defendant's appeal against the decision of the learned Deputy Registrar in dismissing the first defendant's striking out application; and

(ii) Appeal No: S-03(IM)-67-04/2012 was filed by the second and third defendants at the court below against the decision of the learned High Court Judge in dismissing the second and third defendants appeal against the decision of the learned Deputy Registrar in dismissing the second and third defendants' striking out application.

Background Of The Appeal

[4] On 11 October 2012, the plaintiffs brought this representative action on their behalf and on the behalf of the native communities whom are the residents, proprietors, occupiers, holders and claimants of lands ("said land") vested with native title and/or native customary rights at the Tongod Region seeking 17 declaratory and injunctive reliefs and damages against the defendants.

[5] It is the plaintiffs pleaded case that they are the natives and descendants of the natives indigenous to the State of Sabah from the Dusun communities. Further to the foregoing it is also the plaintiffs' pleaded case that they and their ancestors have settled as native communities residing in the Tongod Region for at least five generations even before the formation of colonial North Borneo, the predecessor of the Sabah State Government ("fifth defendant") and prior to the enactment of the Land Ordinance 1930 and all its preceding proclamation and legislations in land since 1881. The plaintiffs' stance is that they and their ancestors have acquired native customary rights since time immemorial over the said land measuring some 8,830 hectares in the Tongod area. It is the plaintiffs' pleaded case that during the period between 1985 and 1999, they by themselves or their predecessors had applied to the Director of Department of Lands and Survey, Sabah ("fourth defendant") for the respective parcels of land comprised in the said land for the issue of the respective documents of title.

[6] The present dispute arose when the fourth defendant, namely the Director of Lands and Surveys Department approved Hap Seng Consolidated Bhd's ("first defendant") application for country lease in year 1997 and thereafter had alienated to the first defendant the land in the Tongod Region measuring 21,819 acres and in 1999, issued the land title in Country Lease No: 095330724. The first defendant together with Asiatic Development Bhd ("second defendant") cleared the land and planted it with oil palm. On 3 May 2002, the first defendant sold and transferred the land to Tanjung Bahagia Sdn Bhd ("third defendant").

[7] The plaintiffs contended that the alienation of the said land to the first defendant by the fourth defendant was subject to their accrued native customary rights beneficially belonging to the plaintiffs and their native community. The plaintiffs' claim against the first, second and third defendant was precipitated by the defendants' wrongful act of trespassing onto the said land to conduct survey works, extensive site clearing and other earthwork. The plaintiffs allege that the defendants' wrongful act of trespassing on the said land had destroyed and damaged substantial parts of the land which consists of crops, fruit trees, and other forest produce grown thereon.

[8] The plaintiffs' claim against the fourth and the fifth defendant was that the alienation and issuance of a country lease for the said land to the first defendant was wrongful and/or unconstitutional and/or in breach of their fiduciary duty. The plaintiffs further claimed that the conduct of the fourth and fifth defendant in taking the said land offends art. 8 and art. 5 of the Federal Constitution in that there is discrimination in terms of process and compensation as between the acquisition of the native customary land and deprivation of the natives livelihood. Further and in the alternative, the plaintiffs also claim that the alienation and issuance of the country lease was unconstitutional in that it violates art. 161A(5) of the Federal Constitution with regard to the special position of natives in the State of Sabah.

[9] After the close of pleadings, on 11 February 2002, the first defendant applied *vide* summons in chambers in encl. 48 to strike out the plaintiffs' writ of summons and statement of claim under O. 18 r. 19(1) of the Rules of the High Court 1980 ("RHC"). The second and third defendant followed suit by filing a similar

application on 26 February 2003 *vide* encl. 58 to strike out the plaintiffs writ of summons and statement of claim under O. 18 r. 19(1) of the RHC. In applying to strike out the plaintiffs' claim the first, second and third defendants' bone of contention was that the High Court has no original jurisdiction to hear the plaintiffs' claim as the dispute over the alienation of the said land is still pending before the Assistant Collector of Land Revenue ("ACLR").

[10] On 13 March 2003, the Deputy Registrar dismissed both encls. 48 and 58. Dissatisfied with the decision of the Deputy Registrar, the first defendant, second defendant and third defendant appealed to the judge in chambers in encls. 87 and 92 respectively.

[11] Whilst the appeals were pending, the learned Judicial Commissioner ("JC") heard the first defendant as well as second and third defendants' preliminary objection to the plaintiffs' application for injunction *vide* encl. 18 filed on 30 October 2002. The learned JC allowed the preliminary objection premised on the ground that the High Court had no jurisdiction to hear the plaintiffs' claim for native customary rights pursuant to ss. 14, 16, 41, and 69 of the Sabah Land Ordinance. As a result the plaintiffs' claim was accordingly dismissed on 20 June 2008.

[12] Aggrieved by the aforesaid decision the plaintiffs appealed to the Court of Appeal. On 9 June 2011, the appeal was dismissed. However, on 25 July 2011, the plaintiffs were successful in obtaining leave to appeal to the Federal Court, which approved four leave questions. Subsequently on 24 November 2011, the Federal Court allowed the plaintiffs' appeal and directed the High Court to hear encls. 87 and 92 ie, the two appeals by the first defendant and second and third defendants against the decision of the Deputy Registrar in refusing to strike out the plaintiffs' writ and statement of claim. In consequence, the plaintiffs' suit was reinstated and remitted back to the High Court.

[13] Enclosures 87 and 92 were heard before the High Court Judge as ordered by the Federal Court. On 21 March 2012, Abdul Rahman Sebli J heard encls. 48 and 58 and dismissed the two appeals with costs. In so doing, His Lordship held, *inter alia*, that:

A (a) The Collector had no jurisdiction to hear the plaintiffs' claim because the Collector's jurisdiction is limited to determining NCR over unalienated land and not in respect of land which has already been alienated as in the present case;

B (b) There is at least one serious triable issue in the plaintiffs' claim, namely, whether the fourth and fifth defendant had wrongfully and unconstitutionally alienated the land to the first defendant in disregard of the acquired or accrued NCR of the plaintiffs in the land; and

C (c) The plaintiffs' claim in challenging the fourth and fifth defendants decision in alienating the land to the first defendant falls squarely within the jurisdiction of the High Court.

Submissions

D

[14] The defendants forcefully argued that the High Court does not have original jurisdiction to hear claims for NCR. In support of this proposition learned counsel relied on s. 69 of the Land Ordinance which provides that claims to land based on customary E tenure shall be decided by the Collector. Notwithstanding this, s. 41 of the Land Ordinance clearly spells out that no court shall exercise jurisdiction in respect of which jurisdiction is given to the collector. The procedure and claims for NCR has been aptly set forth in the Ordinance particularly under s. 9, s. 13, s. 14, s. 15, F s. 16 and s. 41. Learned counsel highlighted that procedurally s. 41 provides that an appeal from the Collector will be heard by the director and then by the High Court. By reason of the matters aforesaid, learned counsel for the defendants submitted that the plaintiffs by filing this suit whilst still waiting for the ACLR G to conduct an inquiry had subjected themselves to multiplicity of proceedings as the ACLR and the High Court may arrive at different and conflicting decisions. There is multiplicity of proceedings involved as the plaintiffs even before having their rights determined before the ACLR had proceeded to ventilate H their claims before the High Court. In this regard learned counsel submitted that the ACLR is the in the best possible position to determine such NCR claims. If the ACLR makes a decision which is not satisfactory, there is always procedure for appeal which the plaintiffs can avail themselves to as laid down under the law.

I

[15] The plaintiffs in resisting the defendants' striking out applications submitted that the High Court has jurisdiction as under s. 14 of the Sabah Land Ordinance as the Collector has jurisdiction only to determine NCR claims over State land in situations envisaged under ss. 12 to 14 of the Ordinance and not over alienated land such as the land in dispute in this action. As such learned counsel for the plaintiff submitted that the High Court has jurisdiction to review the decision of the director as the director went outside the jurisdiction conferred on him when he alienated the said land to the first defendant. The plaintiffs stance is that the High Court has jurisdiction to review the decision of the director in the exercise of his discretion if it was wrong in law, arbitrary, unreasonable or was exercised in bad faith or was not exercised according to rule of reason and justice.

Issues And Findings

[16] As evident from the submissions of the parties in this appeal, we have to consider this appeal on two broad grounds – one pertains to whether the learned judge was right in refusing the defendants striking out application, and the other whether there are merits in the plaintiffs' case and that the action was not frivolous, vexatious or an abuse of the process of the High Court. In other words, is this a case where the plaintiffs' claim should be struck out without giving them an opportunity to have their day in court. It is trite law that the court hearing a striking out application will only strike out a writ and statement of claim when it is plainly obvious that the action cannot be sustained and liable to be struck out pursuant to O. 18 r. 19 of the RHC 1980 under the various grounds set forth under limb (a), (b), (c), and (d). The test for striking out under any of the four limbs in O. 18 r. 19 of the RHC 1980 is well settled, and has been laid down in cases such as *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16.

[17] We have anxiously deliberated on the issues at hand and we are of the view that based on the facts and circumstances, this is not a proper and fit case for the plaintiffs' writ and statement of claim to be struck out under O. 18 r. 19(1) of the RHC. The fact that the Federal Court on 24 November 2012, had allowed

the plaintiffs' earlier appeal against the decision of the Court of Appeal that the High Court should not have struck out the plaintiffs' claim based on the preliminary objections of defendant, was a clear indication that there are triable issues before the High Court which warrant a trial. We are of the view that the issues raised in this appeal and the relief sought thereof does not relate to jurisdiction of the court but concerns matters relating to the plaintiffs' constitutional rights and common law rights. Whether the plaintiffs succeeds or not is a matter to be tried by the trial judge who has to take into consideration the decision of the Court of Appeal as well as the Federal Court. As such we find that the learned High Court Judge was right in refusing the defendants' striking out applications premised on his findings that there are triable issues in the plaintiffs' action. The affirmation by the Federal Court in the earlier appeal puts the correctness and propriety of the learned High Court Judge's decision beyond question. Thus in the interest of justice it is only proper that all the issues raised in this appeal should be ventilated at the trial proper based on the evidence adduced by the parties. At the full trial the defendants can still raise the issue of jurisdiction, which the trial court would have to decide on the submission on the point having regard to the factual matrix of this case. Further to the foregoing, we do take cognizance of the fact the since December 2012 until March 2013, the High Court has commenced the trial of this action.

[18] For the above stated reasons we dismissed both the appeals with costs.